

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

UNITED STATES OF AMERICA,)	CRIM. ACTION NO. 3:96CR50034
)	
v.)	
)	<u>MEMORANDUM OPINION</u>
RAY WALLACE METTETAL, JR.,)	
)	
Defendant.)	JUDGE JAMES H. MICHAEL, JR.

Before the court is the defendant's Motion for Final Judgment on Defendant's Request Under Rule 41(e),¹ filed on October 28, 2004. On November 3, 2004, this case was referred to the Honorable B. Waugh Crigler, United States Magistrate Judge, for proposed findings of fact and a recommended disposition. The Magistrate Judge filed his report on November 17, 2004. The Magistrate Judge recommended that the court grant the government's November 5, 2003 Motion to Quash Subpoenas and deny the defendant's February 26, 2003 Motion for Return of Property. The defendant filed timely objections to the Report and Recommendation. After a thorough examination of the defendant's objections, the supporting memoranda, the applicable law, and the Report and Recommendation, this court REMANDS the matter to the Magistrate Judge to conduct any proceedings necessary to determine whether the substance in question is contraband.

¹ This rule was amended, and Fed. R. Crim. P. 41(g) currently governs motions to return property.

I. Procedural History

The defendant, Ray Wallace Mettetal, Jr., is essentially renewing his motion of February 26, 2003 seeking the return of his property, an alleged amount of ricin, which was seized by the government pursuant to an unlawful search. He requests that a sample of the substance be released to him or an independent laboratory so that it can be tested for toxicity. This matter was referred to the Magistrate Judge, who denied the motion on May 29, 2003, finding that Mettetal was unable to propose a safe way to test the substance. Mettetal appealed the Magistrate Judge's decision to this court, and on July 21, 2003, this court vacated the Magistrate's order and remanded it back to him for further proceedings. This court ruled that it was the government's burden to prove by a preponderance of the evidence that it had a legitimate reason to retain the property, and the Magistrate Judge had improperly placed the burden on Mettetal.

On remand, the Magistrate Judge denied Mettetal's motion on a different basis. In his December 19, 2003 order, the Magistrate Judge ordered that Mettetal was judicially estopped from challenging whether the specimen was toxic since, in his first trial, Mettetal stipulated that the item was toxic ricin. The Magistrate Judge also granted the government's motion to quash the subpoenas that Mettetal had requested in anticipation of a hearing on the specimen's toxicity.

Mettetal appealed the Magistrate Judge's order to the Fourth Circuit, where it was dismissed because the matter had not been heard by a district court and was not a final

order. Following dismissal by the Fourth Circuit, Mettetal filed the instant motion with this court which requests the same relief as did his original February 26, 2003 motion seeking the return of his property for testing. This court remanded the case to the Magistrate Judge who, on November 17, 2004, reissued his earlier December 19, 2003 order as a Report and Recommendation. The court now reviews the merits of that recommendation.

II. Discussion

When a party attempts to assert inconsistent factual assertions in separate judicial proceedings, courts may apply the doctrine of judicial estoppel to prevent a party from playing "fast and loose with the court, and to protect the essential integrity of the judicial process." *Lowery v. Stovall*, 92 F.3d 219, 223 (4th Cir. 1996). It is an equitable doctrine invoked by a court at its discretion and should be "applied with caution" "in the narrowest of circumstances." *Id.* at 224. There are three factors that must be present for courts to apply judicial estoppel, and it is not clear that these factors are satisfied in this case.

"First, the party sought to be estopped must be seeking to adopt a position [on a factual issue] that is inconsistent with a stance taken in prior litigation." *Lowery*, 92 F.3d at 224. Mettetal did stipulate in his first trial that the specimen found in his storage facility was toxic ricin, but he disputed whether the specimen was toxic in his second trial. While it is true that his position in this proceeding is inconsistent with his position in his first trial, it is consistent with the position he took in his more recent second trial. Therefore, this court cannot find that there is a clear inconsistency here.

Second, "the prior inconsistent position must have been accepted by the court." *Id.* This usually means that "the party asserting the earlier contrary position there prevailed." *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167 (4th Cir. 1982) (noting that judicial estoppel is most appropriate in situations where the party was successful). Most courts "inquire whether the party has succeeded in persuading a court to accept that party's earlier position, [because] judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity." *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (1996) (internal citations and quotations omitted). In this case, the court did accept Mettetal's stipulation during his first trial, but the conviction was ultimately vacated. During the second trial, Mettetal disputed that the substance was toxic ricin. Thus, there does not appear to be any risk of inconsistent court determinations or any threat to judicial integrity.

Third, the party must have "intentionally misled the court to gain unfair advantage," as opposed to asserting the inconsistent position by inadvertence or mistake. *Clark Co. v. Faggert & Frieden*, 65 F.3d 26, 29 (4th Cir. 1995) (referring to this factor as "the determinative factor"). This requirement is based on the idea that "[t]he vice which judicial estoppel prevents is the cold manipulation of the courts to the detriment of the public interest." *Id.* In this case, Mettetal argues that his earlier stipulation was made by his counsel without his foreknowledge or consent. It is also difficult to conclude that

Mettetal's current position is intentionally misleading because, in his second trial, he called an expert witness who disputed that the substance was toxic ricin.

In short, it is not clear that judicial estoppel is proper on the facts of this case. Because the Fourth Circuit has counseled that judicial estoppel should be "applied with caution" "in the narrowest of circumstances," this court declines to use this discretionary tool in this case. *Lowery*, 92 F.3d at 224. The case shall be remanded to Magistrate Judge Crigler for an evidentiary hearing where the government will be given a chance to meet its burden to show that the specimen is contraband.

The court acknowledges the difficulties and complexities that are present in a case such as this one where a movant issues subpoenas to various government officials regarding their role in testing a potentially toxic substance. It is certainly improper for Mettetal to issue individual subpoenas to government witnesses requesting them to produce the alleged toxic substance at issue – the court is currently trying to ascertain whether that substance is contraband and hence whether a sample of it can be released for testing. However, provided that he follows the proper procedures for issuing subpoenas, Mettetal should be able to conduct a *limited* inquiry regarding issues about the methodology that the government used to test the specimen. The court expresses no formal opinion on the government's motion to quash and asks the Magistrate Judge to resolve the motion on its merits.

An appropriate order this day shall issue. The Clerk of the Court hereby is directed to send a certified copy of this Memorandum Opinion to all counsel of record and to Magistrate Judge Crigler.

ENTERED:

Senior United States District Judge

Date

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UNITED STATES OF AMERICA,)	CRIM. ACTION NO. 3:96CR50034
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v.)	
)	<u>ORDER</u>
RAY WALLACE METTETAL,)	
)	
Defendant.)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED, ORDERED, AND DECREED

that this action shall be, and it hereby is, REMANDED to United States Magistrate Judge B. Waugh Crigler, for proceedings necessary to determine whether the substance at issue is contraband and should be returned under Rule 41(g).

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record and the defendant.

ENTERED: _____
Senior United States District Judge

Date